INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	2
A. The Board's findings and conclusions	2
1. The unlawful hiring agreement between petitioner and the Company	3
2. The discriminatory refusal to hire Mrazek, Smith, Duncovich, and Marin	5
a. Mrazek	6
b. Marin, Smith and Duncovich	7
3. The Board's findings and conclusions of law	8
B. The decision of the court below	9
Argument	9
Conclusion	13

CITATIONS

Cases:

National Labor Relations Board v. *Gaynor News*, 197 F. 2d 719, affirmed, 347 U. S. 17	12
National Labor Relations Board v. *International Union of Operating Engineers, Local No. 101*, 216 F. 2d 161	11
National Labor Relations Board v. *Knickerbocker Plastic Company*, 218 F. 2d 917	12
National Labor Relations Board v. *Del E. Webb Construction Co.*, 196 F. 2d 702	10
National Labor Relations Board v. *Del E. Webb Construction Co.*, 196 F. 2d 841	11
Radio Officers' Union v. *National Labor Relations Board*, 347 U. S. 17	10, 11

Statutes:

National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., 151, *et seq.*):	
Section 8 (b) (1) (A)	2, 9, 10
Section 8 (b) (2)	2, 9, 10

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 414

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS AND HELPERS OF AMERICA, A. F. L., DISTRICT NO. 2, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (Pet. App. A) is reported at 232 F. 2d 393. The findings of fact, conclusions of law, and order of the Board (Pet. App. B., R. 336–347, 265–312) are reported at 110 NLRB 2116.

JURISDICTION

The judgment of the court below was entered on June 6, 1956. A petition for rehearing was denied on June 6, 1956. The petition for a writ of certiorari was filed on September 13, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

QUESTIONS PRESENTED

1. Whether the Board properly found that petitioner union, by maintaining and performing a hiring agreement with the employer giving preference to members of the union, and causing the employer to refuse to hire four applicants because they were not members of the union, violated Section 8 (b) (2) and (1) (A) of the National Labor Relations Act.

2. Whether a "savings clause" in the agreement, in terms suspending the operation of any union-security provision in the contract prohibited by law, precluded a finding that petitioner had engaged in the unfair labor practices referred to in Question 1.

STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., 151, *et seq.*), are set forth in the Petition, pp. 3–4.

STATEMENT

A. THE BOARD'S FINDINGS AND CONCLUSIONS

The Board found that petitioner had violated Sections 8 (b) (2) and (1) (A) of the Act by maintaining and performing an unlawful hiring agreement with the Babcock and Wilcox Company, herein called the Company, and by causing the Company pursuant to this agreement discriminatorily to refuse to hire four applicants for employment. The facts may be summarized as follows:

1. THE UNLAWFUL HIRING AGREEMENT BETWEEN PETITIONER AND THE COMPANY

The Company is engaged in the manufacture, sale, and installation of steam boilers and related products (R. 266; 8–9, 75–76). The present case arose during the Company's installation of steam boilers in Astoria, Long Island, New York, for the Consolidated Edison Company of New York (R. 266; 8–9). Petitioner and the Company executed a contract, effective July 1950 through June 1953, applicable to all Company projects within petitioner's "jurisdiction" (R. 274–275; 13–16). Section 1 of the contract provided that (*ibid.*):

> The Employer shall employ none but building construction members in good standing in the Union on all work * * * coming within the jurisdiction of [petitioner] District No. 2 * * *. The Employer further agrees that he will demand and see the working cards and Building Trades quarterly cards of Employees before employing them.

Petitioner agreed to supply "such competent mechanics and helpers as the Employer may reasonably require" and to permit its members to work with non-members "when the Union has failed to supply a sufficient number of mechanics and helpers" (*ibid.*). Section 39 of the contract further provided that (R. 277–278; 15–16):

> Any provisions of this Agreement which provide for Union Security or employment in a manner and to an extent prohibited by any

law or determination of any governmental board or agency, shall be and hereby is of no force and effect during the terms of said prohibition. It is understood and agreed, however, that if any of the provisions which are hereby declared to be of no force and effect because of restrictions imposed by law, are determined either by Act of Congress or other legislative enactment or by a decision of the court of highest recourse to be legal or permissible, then any such provisions shall immediately become or remain effective during the remainder of the term of this Agreement. The Union reserves the right to renegotiate any of the provisions, which may be of no force or effect. In the event that there shall be change in applicable laws as to Union Security, the parties shall renegotiate any provisions concerning Union Security.

In the event that any provisions of this Agreement shall be declared to be in violation of law, the remaining provisions of this Agreement shall remain in full force and effect.

The Company hired boilermakers at the Astoria project through its boilermaker foreman, John Hagan (R. 282; 156). Foreman Hagan, as required by the contract between petitioner and the Company, was a member in good standing of petitioner (R. 281; 161). As called for under the contract, Hagan, in his hiring practice, accorded preference to petitioner's members (R. 282; 166–169). After determining in consultation with the job superintendent how many boilermakers were needed at any given time, Hagan

would call petitioner's so-called Day Hall for men (R. 282; 156–157). If the hall could not supply the number of boilermakers needed, Hagan hired men who applied at the project gate, giving preference to members of petitioner, who were the only boilermakers in the area entitled to the Building Trades quarterly cards cited in Section 1 of the 1950 contract (R. 282; 156–159).[1] Hagan testified that he hired men from other locals affiliated with the International Brotherhood of Boilermakers only "if we did not have enough men" from petitioner (R. 283; 163). All boilermakers employed at the Astoria project were members of the International (R. 163; 160).

2. THE DISCRIMINATORY REFUSAL TO HIRE MRAZEK, SMITH, DUNCOVICH, AND MARIN

Mrazek, Smith, Duncovich, and Marin are members of Lodge 23 of the Boilermakers International. Lodge 23's charter from the International limits its work jurisdiction to the Brooklyn Navy Yard (R. 268; 80). Mrazek unsuccessfully applied for work at the Astoria job several times during December 1952 and also on January 5, 1953. Smith, Duncovich, and Marin were each refused employment by Foreman Hagan on January 8, 1953. The details concerning

[1] Petitioner and its constituent lodges are affiliated with the New York Building Trades Council (R. 268; 77, 82). The Trades Council issues quarterly cards to its component organizations, including District 2, for distribution to their membership (R. 268; 82). District 2 issues cards only to its members in good standing (R. 268; 80–81).

the discriminatory failure to offer employment to the four men are set forth below:

a. *Mrazek*

Mrazek worked at various building and construction jobs during 1952 and 1953 (R. 286; 57, 149). Mrazek was laid off from a building and construction job at Garden City on December 3, 1952, and the next day spoke to Hagan about his "chances of getting on" the Astoria job (R. 287–288; 136, 149). Hagan looked at Mrazek's Lodge 23 union book, asked whether Mrazek had a Building Trades card, and when Mrazek said he did not have one, said he was "sorry," that he needed men but that he could not put Mrazek to work without petitioner's permission (R. 288; 136–137). He advised Mrazek to go to petitioner's headquarters at 14th Street "and get the okay. I will put you on as soon as you come back" (*ibid.*). At petitioner's Day Hall next day, Mrazek told Field Representative Daniel Boylan[2] about his conversation with Hagan and asked Boylan for a job at the Astoria project (R. 288; 140). Boylan said he could do nothing since Mrazek did not have a Building Trades card (*ibid.*).

Mrazek applied for work at the job site several times in December 1952 and also on January 5, 1953

[2] Petitioner's three field representatives, Walter Graber, Charles Alexander, and Daniel Boylan, are officials of petitioner and its constituent lodges (R. 286; 38, 39, 52). They participate in contract negotiations, adjust job disputes and grievances, and send men out to jobs from the Day Hall (R. 286–287; 38, 95–96, 98–99). They are immediately responsible to petitioner's chairman, Harry Nacey (R. 286; 97).

(R. 288; 136–139). In addition to conversations with Hagan, he tried in vain to see petitioner's chairman, Harry Nacey, and also spoke to Field Representative Walter Graber concerning employment at Astoria (R. 288; 137, 141–143). Graber commented, "Look, you know what the score is; I don't have to tell you anything" (R. 288–289; 143).

Mrazek remained out of work until sometime in February 1953 when he expressed his willingness, while at the Day Hall, to accept employment in Newburgh, New York (R. 289; 148). He was sent to this job by a trustee of one of petitioner's constituent lodges (*ibid.*).

b. *Marin, Smith and Duncovich*

Marin and Smith are veteran boilermakers with building and construction experience (R. 289–290; 57, 102–103, 107, 112, 120–121, 125, 153–155). Smith had worked for Foreman Hagan in 1948 or 1949 (R. 289; 102). Marin and Smith asked Foreman Hagan for employment at the Astoria project on January 8, 1953 (R. 290; 103–104, 120). As with Mrazek, Hagan advised them that, since they were Lodge 23 members and did not have Building Trades quarterly cards, to get an "Okay" from petitioner's headquarters at 14th Street (R. 290; 104). The two men went to the 14th Street office and spoke to Field Representative Graber (R. 290; 104–105). Graber said he was "sorry" but that the jobs at the Astoria project were being held for members of petitioner who were "winding up on other jobs" (R. 290; 105). He agreed with

Smith's statement "we used to get jobs out of there [petitioner's Day Hall]," but explained that petitioner no longer "had an abundance of work to spread around" (R. 290–291; 105).

Duncovich also applied for work at the Astoria project on January 8 and received the same advice from Hagan to "go downtown and get fixed up. I can't do nothing for you" (R. 291; 125–126). That same day, Duncovich went to both the Day Hall at 23rd Street and petitioner's headquarters at 14th Street (R. 291; 126–127). He was advised by Field Representative Alexander at the Day Hall, and by Field Representative Graber at 14th Street, that no jobs were open (R. 291; 127). Graber also remarked that Hagan "should know better" than to send Duncovich to headquarters (R. 291; 127–128).

3. THE BOARD'S FINDINGS AND CONCLUSIONS OF LAW

On the facts summarized above, the Board found (R. 338, 291–294) that petitioner and the Company maintained and carried out an unlawful hiring arrangement giving employment preference to members of petitioner or other International Lodge members referred or cleared by petitioner. The Board further found (R. 338, 294–295) that the Company pursuant to this unlawful hiring arrangement discriminatorily refused employment to Mrazek, Smith, Marin, and Duncovich and that petitioner caused the Company so to discriminate against them. The Board concluded that by maintaining and performing its discriminatory contract with the Company, and by caus-

ing the Company to discriminate against the four men, petitioner violated Sections 8 (b) (2) and (1) (A) of the Act (R. 338, 295).

The Board rejected petitioner's contention that the preferential hiring provisions of the contract were not violative of the Act since the "savings clause" in the contract suspended their operative date. The Board held that whatever the significance of the "savings clause," the parties had in fact pursued a discriminatory hiring arrangement (R. 336, 291–292). The Board also rejected petitioner's further contention that its parent international had the right, under the proviso to Section 8 (b) (1) (A) of the Act, to determine the jurisdiction of its subordinate lodges and thereby fix the employment opportunities of members of these lodges. The Board held that the proviso, which protects a union's right to prescribe its own rules with respect to the retention or acquisition of membership therein does not permit discrimination with respect to employment on the basis of union membership or the lack of it (R. 336, 293–294).

B. THE DECISION OF THE COURT BELOW

The court below in separate opinions by Judges Frank and Lumbard, concurred in by Judge Waterman, affirmed the Board's findings and conclusions and enforced the Board's order in full (Pet. 19–23).

ARGUMENT

1. The record clearly supports the Board's finding, affirmed by the court below, that petitioner entered into a hiring arrangement giving employment prefer-

ence to its members and pursuant to that arrangement caused the employer to deny employment to the four complainants because they were not members of petitioner union. Such discriminatory action on the part of petitioner constitutes, as the court below correctly concluded, a clear violation of Section 8 (b) (2) and (1) (A) of the Act, and the case therefore presents no question warranting further review. *Radio Officers Union* v. *National Labor Relations Board,* 347 U. S. 17.

Petitioner's assertion (Pet. 15) that the hiring arrangement and the denial of employment to the four complainants had as its object "the employment of experienced workmen" as evidenced by their classification by the union in different locals rather than discrimination on the basis of membership or non-membership in the union is insubstantial. There is nothing in the record to show that the four complainants were not competent to perform the work for which they applied; indeed their employment history shows that they had pursued their trade as boilermakers in the building and construction industry as well as shipyard or navy yard boilermakers. Moreover, the four complainants were denied employment by the Company only because petitioner refused them clearance, and such clearance was refused not because the four applicants were lacking in experience or qualifications but because petitioner sought to preserve the job opportunities for its members (*supra,* pp. 7–8; R. 295).

Petitioner's reliance on *National Labor Relations Board* v. *Del E. Webb Construction Co.,* 196 F. 2d

702 (C. A. 8), as in conflict with the decision below, is misplaced. Apart from significant differences in the facts of the two cases, the *Del E. Webb* case, as pointed out by the court below (Pet. 21, n. 1) was overruled in all pertinent respects by the decision of this Court in *Radio Officers' Union* v. *National Labor Relations Board,* 347 U. S. 17, 22–23 (n. 2), 52. See also the subsequent decision of the Eighth Circuit in *National Labor Relations Board* v. *International Union of Operating Engineers, Local No. 101,* 216 F. 2d 161.

Petitioner's further claim (Pet. 16–17) that the Board improperly inferred a discriminatory purpose from the circumstance that only union members were employed by the Company and that the decision below affirming this finding conflicts with *National Labor Relations Board* v. *Del E. Webb Construction Co.,* 196 F. 2d 841 (C. A. 8) is insubstantial. The short answer to this contention is that this evidentiary link in the Board's findings was merely one of many on which the Board relied, and the probative weight to be given to it in any case necessarily turns upon the surrounding circumstances of each case.

2. Equally without merit is petitioner's further contention (Pet. 18) that the "savings clause" of the agreement between the Company and the Union, which provided that any union security provisions in the contract prohibited by law were to be inoperative, precluded a finding of unfair labor practice with respect to the preferential hiring arrangement. In the first place, the Board found (R. 292), and the court

below agreed, that irrespective of the construction of the contract, "the actual employment practices in this case * * * operated as if [the "savings clause"] were not in the contract." Secondly, apart from the foregoing consideration, petitioner's contention is lacking in merit. As the court below stated in *National Labor Relations Board* v. *Gaynor News,* 197 R. 2d 719, 723–724, affirmed, 347 U. S. 17, in language equally applicable here—

> Very recently, in N. L. R. B. v. Red Star Express Lines [April 14, 1952], we held that a similar "saving clause"—if anything a more cautious one, providing that provisions of questionable legality under the 1947 amendments to the Labor-Management Act should not go into effect until held legal—would not suffice to prevent the agreement from constituting an unfair labor practice. Our reason was that an employee cannot be expected to predict the validity or invalidity of particular clauses in the contract, and will feel compelled to join the union where a union-security clause of questionable validity exists, if only as a hedging device against a possible future upholding of the clause. Only a specific provision deferring application of the union-security clause will immunize the contract against this illegality. The same principles serve to void the union-security provisions here.

Accord: *National Labor Relations Board* v. *Knickerbocker Plastic Company,* 218 F. 2d 917, 923–924 (C. A. 9). There are no contrary decisions.

CONCLUSION

The decision below is correct and presents neither a conflict of decisions nor any substantial question warranting review. The petition for a writ of certiorari should be denied.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

THEOPHIL C. KAMMHOLZ,
General Counsel,
DOMINICK L. MANOLI,
Assistant General Counsel,
MELVIN POLLACK,
Attorney,
National Labor Relations Board.

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